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No. 92-903

In the Supreme Court of the United States

OCTOBER TERM, 1922

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the offense of making use of an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 21 U.S.C. 857 (1988), contains a *mens rea* element.

2. Whether 21 U.S.C. 857 (1988) is unconstitutionally vague as applied to petitioners.

3. Whether petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 969 F.2d 652.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. On August 17, 1992, the court of appeals denied a petition for rehearing. Pet. App. A50. The petition for a writ of certiorari was filed on November 16, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 857 and 841(a)(1) of Title 21, United States Code (1988), Section 2 of Title 18, and the Model Drug Paraphernalia Act are reprinted at App., *infra*, 1a-11a.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioners were convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988) (Counts 1 and 2) and conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count 3). Petitioner Acty was also convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 4); investing income derived from a drug offense, in violation of 21 U.S.C. 854 (Count 5); money laundering, in violation of 18 U.S.C. 1956(a)(1) (Count 6); two counts of engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957 (Counts 7 and 8); and one count of conspiring to use an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 18 U.S.C. 371 (Count 9). Acty was sentenced to imprisonment for 108 months, to be followed by a five-year term of supervised release, and was fined $150,000. Posters 'N' Things was fined $75,000. The court of appeals affirmed. Pet. App. A1-A49.

1. Acty formed Posters 'N' Things, Ltd., in 1977. Posters 'N' Things operated several businesses, including a store named "Forbidden Fruit," which was later renamed "World Wide Imports." Law enforcement officers received complaints that the store was selling drug paraphernalia. In addition, officers investigating drug cases found drug diluents (chemicals used to "cut" or dilute illegal drugs) and other drug paraphernalia that had been purchased from Forbidden Fruit. Pet. App. A3-A4; Tr. 658-659.

In March 1990, law enforcement officers executed warrants to search petitioners' business premises and Acty's residence. The officers seized various items, including pipes, bongs, roach clips, scales, and drug diluents including mannitol and inositol. The officers also seized cash, business records, a newspaper article entitled "Drug paraphernalia seized," a copy of 21 U.S.C. 857 (1988), and catalogs and advertisements describing products sold by petitioners. Pet. App. A4-A5; GX 92C. The advertisements offered "Coke Kits" and "Free Base Kits" for sale. GX 85, J.A. 36. In addition, petitioners advertised a product called "PseudoCaine" as "The Hottest Active Cut In The Nation! Its the new cut product everybody who bought Mannitol is now begging for! * * * 'Burns' just like the real thing." Pet. App. A39-A40; GX 164, J.A. 45.

William Hopkins, a retired police officer, testified for the government as an expert on drug paraphernalia. He testified that many of the items seized from petitioners are used exclusively or primarily with illegal drugs. For example, metal pipes with screens are used almost exclusively to smoke hashish. Tr. 452-454, 456. In addition, Hopkins testified that certain features of the wooden pipes sold by petitioners revealed that they were designed for use with marijuana. The bowls or burning chambers of the pipes are much smaller than the bowls of tobacco pipes. In addition, the stems of marijuana pipes differ from the stems of tobacco pipes. Tr. 432, 450-451. Hopkins explained that water pipes or bongs remove the harsh "bite" from marijuana smoke by filtering it through water. Such filtration is unnecessary for tobacco smoke, because the bite is removed when

tobacco is fermented, aged, and cured. Water pipes, he explained, would actually remove the flavor from tobacco. Tr. 433. Hopkins stated that an electric pipe seized from petitioners is designed to pump additional marijuana smoke into the smoker's lungs in order to increase the effect of the drug. Tr. 459. In addition, Hopkins explained that an item known as an "executive or cocaine kit" contained a miniature scale to weigh cocaine, a cocaine spoon, a grinder to grind "rock" cocaine, and a funnel that screws on to the top of a cocaine vial. Tr. 461-464.[1]

Among petitioners' regular customers were four convicted drug dealers who had purchased drug diluents in amounts that drug dealers rather than users would purchase. Pet. App. A40. One of the dealers, Randy Kennedy, testified that Forbidden Fruit was a one-stop shop from which he bought drug diluents, scales for weighing cocaine, "crack" pipes, and plastic baggies to package cocaine for sale. Tr. 1550-1553, 1588. From March 1989 to January 1990, Kennedy made numerous trips to the store and purchased between $2,000 and $4,000 worth of merchandise. Tr. 1552. Another dealer, Thomas Searles, began making purchases at Forbidden Fruit when he was 13 or 14 years old. He went to the store three or four times a week and spent $5,000 there during a five-month period. Tr. 721, 735.

[1] Additional information about drug paraphernalia is contained in United States International Trade Commission, *Importation of Certain Drug Paraphernalia into the United States: Report to the Committee on Finance, United States Senate, on Investigation No. 332-277 Under Section 332 of the Tariff Act of 1930*, at 16-23 (USITC Pub. No. 2223, Sept. 1989); and Paul Dennis & Carolyn Barry, *The Marijuana Catalogue* 107-147 (1978).

Acty's employees knew they were selling drug paraphernalia. Tr. 528, 581, 593. Acty posted a list of words that her employees were directed to avoid using because the words revealed that the employees knew the items being sold were drug paraphernalia. GXs 87A, 87B, 87C. When customers referred to "getting high" or needing a "pot pipe," the employees were instructed to refer to tobacco and tell the customers to "use [the items] for what you want; we don't want to know." Tr. 523, 527, 559, 580. Acty's husband and business partner, co-defendant George Moore, boasted to a prospective employee that his income came from "the largest retail outlet of drug paraphernalia in Iowa." Tr. 618.[2]

2. The district court instructed the jury that in order to convict petitioners of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 21 U.S.C. 857 (1988), the jury was required to find, among other things, that "the items in question constitute drug paraphernalia," that "the defendant whose case you are considering knew the nature and character of the items," and that "the defendant whose case you are considering made use of the interstate conveyance knowingly as part of a scheme to sell drug paraphernalia." J.A. 21.

3. The court of appeals affirmed petitioners' convictions. Pet. App. A1-A49. The court first rejected petitioners' contention that Section 857 is unconstitutional because it lacks a scienter requirement. Pet. App. A12-A26. While acknowledging that the statute

[2] Moore was convicted at trial, but he failed to appear for sentencing. Pet. App. A5 n.1.

does not expressly require proof of scienter, *id.* at A18, the court noted that "[t]he omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute," *id.* at A16, citing *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). The court reasoned that the statutory definition of drug paraphernalia as including "any equipment, product, or material * * * which is primarily * * * designed for use" with a controlled substance establishes that the offense contains what the court termed an "objective scienter" requirement. Pet. App. A19-A20. The court concluded that Section 857(d) "lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent." Pet. App. A22, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). In addition, the court noted that the factors listed in Section 857(e) as relevant to determining whether an item is "drug paraphernalia" were "objective in nature." Pet. App. A22.

The "objective scienter" requirement of Section 857 satisfies due process, the court held. Pet. App. A23-A26. According to the court, the inherent characteristics of an item that is "primarily intended or designed for use" with illegal drugs provide defendants with adequate notice of what conduct the statute makes unlawful.

The court of appeals also held that Section 857 was not unconstitutionally vague. Pet. App. A26-A33. The court explained that a statute is not facially void for vagueness unless it "is impermissibly vague in all of its application[s]." *Id.* at A29, quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). The court explained that Section 857 defined a "clear core of prohibited conduct" and that it was not unconstitutionally vague as applied to petitioners. Pet. App. A30-A31. In challenging the constitutionality of the statute as applied, petitioners' "only point" was that "law enforcement officers who executed the search warrants were able to 'totally ignore' the factors listed in subsection (e) for determining what constitutes drug paraphernalia." *Id.* at A31-A32. The court of appeals rejected the contention "that the factors in subsection (e) were ignored." *Id.* at A32. On the contrary, the court found, the government repeatedly referred to" the statutory factors "to establish that the items being sold were illegal." *Id.* at A32-A33.

Finally, the court of appeals held that the evidence was sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine. Pet. App. A37-A40. The court found that the evidence showed that Acty had sold cocaine diluents to at least four cocaine dealers, including Randy Kennedy, whom she was charged with aiding and abetting. The government showed that several of the diluents Acty sold had few or no lawful uses, and one was advertised by Acty as designed and intended for use as a cocaine diluent. The evidence further showed that Acty sold the diluents in amounts that drug dealers would use. *Id.* at A39-A40.[3]

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[3] The court also rejected Acty's claim that the evidence was insufficient to support her conviction for money laundering. Pet. App. A34-A37. Although the court of appeals agreed with the government that the district court had erred by sentencing Acty to less than the mandatory ten-year term of

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals held that Section 857 contains an "objective scienter" requirement under which "a violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object." Pet. App. A15. Although other courts of appeals have agreed that Section 857 (or its successor, 21 U.S.C. 863) contains a *mens rea* requirement, they have not agreed on the formulation of that requirement. The Sixth Circuit has held that Section 857 "requires an intent to distribute the items for drug use," and that this requirement is satisfied if the defendant had "knowledge that there is a strong probability that the items will be used in this way." *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (1989). The Second Circuit has held that the government satisfies the scienter element by showing either (1) that "the defendant knew there was a strong probability the items would be * * * used" in connection with illegal drugs, or (2) that "the objective features of an item establish *per se* that it is 'designed for use' with illegal drugs." *United States* v. *Schneiderman*, 968 F.2d 1564, 1567 (1992), cert. denied, 113 S. Ct. 1283 (1993). In *United States* v. *Murphy*, 977 F.2d 503, 505-506 (1992), the

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imprisonment for aiding and abetting the manufacture and distribution of more than 100 kilograms of cocaine, the court declined to require resentencing because the government had failed to make a timely objection to the illegal sentence. *Id.* at A40-A45. The court also upheld the district court's downward departure from the Sentencing Guidelines sentencing range. *Id.* at A45-A49.

Tenth Circuit held that "the 'primarily intended' language in § 857(d) constitutes the requisite scienter element of the offense charged." And in *United States* v. *Mishra*, 979 F.2d 301, 307-308 (1992), the Third Circuit held that the scienter element is satisfied by showing either (1) that "the defendant seller contemplated, or reasonably expected under the circumstances, that the item sold or offered for sale would be used with illegal drugs" or (2) that the item is "primarily * * * designed" for use with illegal drugs and "the defendant seller was aware of the general nature of the item."

Although we agree with the courts of appeals that it is appropriate to construe 21 U.S.C. 857 to contain a *mens rea* requirement, our approach differs somewhat from that taken by any of the courts of appeals that have considered the issue, including the court of appeals in this case. In our view, in order to convict a defendant of violating 21 U.S.C. 857, the government must prove that the defendant knew the items at issue are used primarily with illegal drugs. Because the district court's instructions required the jury to find such knowledge in order to convict petitioners, the judgment in this case should be affirmed.

a. Section 857(a)(1) contains no express *mens rea* requirement. It simply provides that "[i]t is unlawful for any person * * * to make use of [an] interstate conveyance as part of a scheme to sell drug paraphernalia." Section 857(d) defines "drug paraphernalia" as any item "which is primarily intended or designed for use" with illegal drugs. Consequently, an item is "drug paraphernalia" within the meaning of Section 857 if it is manufactured for use with illegal drugs or if, regardless of its original design, it is intended to be used for that purpose.

b. Although Section 857 does not contain an express *mens rea* requirement, the Court has held that the failure of Congress to set forth an explicit mental element for a criminal offense does not warrant a departure from the general assumption that criminal offenses require proof of *mens rea*. The legislative history of Section 857 does not warrant a departure from that presumption. Section 857 borrows much of its language from the Model Drug Paraphernalia Act. The Model Act expressly provides that it is "unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used" with controlled substances. Art. I, § B, App., *infra*, 8a-9a. Although Congress omitted that language from Section 857, that omission does not demonstrate a clear intent to create a strict liability offense, particularly in light of the statement of the sponsor of Section 857 that the "primarily intended for use" standard was meant to require a showing of intent on the part of the defendant with respect to the prospective use of the items in question.

c. The appropriate *mens rea* standard for Section 857 is that the defendant must be shown to have acted with knowledge that the items at issue are used primarily in connection with controlled substances. This Court has recognized that "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." *United States* v. *Bailey*, 444 U.S. 394, 408 (1980). Moreover, consistent with general principles of criminal liability, the government was not required to prove that petitioners knew the items at issue satisfied the legal definition of "drug paraphernalia" in

Section 857; it was sufficient for the government to prove that petitioners knew "the character and nature of the materials." *Hamling* v. *United States*, 418 U.S. 87, 123 (1974).

d. In describing the state of mind requirement of Section 857 as applied to the defendants in this case, the district court instructed the jury that the defendants had to know "the nature, character, and use of the items being sold or offered for sale at the store." J.A. 18, 20. The court further instructed that the government had to prove that each defendant made use of an interstate conveyance as "part of a scheme to sell drug paraphernalia," and that each defendant used the interstate conveyance "knowingly as part of that scheme." J.A. 21-22. Those instructions were sufficient to inform the jurors that they could not convict petitioners unless they found, beyond a reasonable doubt, that petitioners knew the nature and use of the items at issue—*i.e.*, that they knew the items were used in connection with illegal drugs.

e. Section 857 is not unconstitutionally vague as applied to petitioners. Congress "define[d] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). First, the statute contains a list of examples of drug paraphernalia that provides defendants and law enforcement officers with guideposts to prohibited conduct. Second, the statutory factors for determining whether an item is drug paraphernalia provide objective criteria for measuring possible violations of the law and min-

imize the likelihood of arbitrary enforcement. Third, the statutory exception for tobacco-related products further limits the scope of the statute and protects those who sell legitimate products from discriminatory enforcement. Finally, the *mens rea* requirement helps overcome any vagueness problem. Although borderline cases may arise under the statute, this is not such a case. Petitioners operated a business devoted substantially to the sale of "hard core" drug paraphernalia, including items specifically listed in Section 857(d). Accordingly, the statute is not unconstitutionally vague as applied to petitioners.

2. Petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). The district court instructed the jury that, in order to convict Acty on the aiding and abetting count, it had to find that Acty (1) knew that her customer Randy Kennedy was manufacturing and distributing cocaine, and (2) acted knowingly and for the purpose of aiding Randy Kennedy in the commission of that offense.

The evidence at trial was sufficient to support Acty's conviction on the aiding and abetting count. The evidence showed that Randy Kennedy made numerous trips to Acty's store over a ten-month period to purchase drug diluents and other paraphernalia. In all, Kennedy spent between $2,000 and $4,000 at the store. Kennedy testified that there was "no question" that the personnel at the store knew that he was using his purchases to cut, package, and distribute cocaine. Tr. 1573.

ARGUMENT

I. TO CONVICT A DEFENDANT UNDER 21 U.S.C. 857, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THE ITEMS AT ISSUE ARE USED PRIMARILY WITH ILLEGAL DRUGS

Petitioners contend (Br. 5-15) that 21 U.S.C. 857 (1988) must be construed to contain a *mens rea* requirement in order to be constitutional. In our view, Section 857 should be construed to require the government to prove that the defendant knew that the items at issue are used primarily with illegal drugs. Because we agree with petitioners that it is appropriate to require proof of *mens rea* under Section 857, there is no occasion for the Court to consider whether Section 857 would be constitutional if it defined a strict liability offense.[4]

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[4] If Section 857 lacked any *mens rea* requirement, it would not necessarily follow that the statute is unconstitutional. "[C]riminal law has broadened its scope to include * * * breaches of 'regulatory measures in the exercise of * * * the police power.'" *United States* v. *Mishra*, 979 F.2d 301, 305-306 (3d Cir. 1992), quoting *United States* v. *Balint*, 258 U.S. 250, 252 (1922). See also *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971); *United States* v. *Dotterweich*, 320 U.S. 277, 284-285 (1943). Accordingly, courts have rejected constitutional challenges to criminal statutes that do not require proof of *mens rea* if they have "a moderate penalty scheme similar to that contemplated by" Section 857. *Mishra*, 979 F.2d at 306.

We recognize, however, that Section 857 applies to "dual-use" items (items that have both legitimate and illegitimate uses) as well as to hard core drug paraphernalia that has no legitimate use. The dual-use items raise more serious constitutional concerns. See *United States* v. *International Minerals Corp.*, 402 U.S. 558, 564-565 (1971) ("In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades,

A. Section 857 Contains No Express *Mens Rea* Requirement

"In determining the scope of a statute, we look first to its language." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Former Section 857 provides:

> It is unlawful for any person—
>
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
>
> (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
>
> (3) to import or export drug paraphernalia.

21 U.S.C. 857(a) (1988).[5] Although Congress's use of the word "scheme" implies the existence of some type of a plan or program, Section 857(a) does not expressly require proof of *mens rea*.

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in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require * * * '*mens rea*' as to each ingredient of the offense.").

[5] In 1990, Congress repealed Section 857 and replaced it with 21 U.S.C. 863 (Supp. II 1990). See Crime Control Act of 1990, Pub. L. No. 101-647, § 2401, 104 Stat. 4858. Section 863 is in large part a reenactment of Section 857. But Section 863 broadened the scope of the Act by eliminating the requirement of a "scheme" in Section 857(a)(1) and by replacing Section 857(a)(2) with a provision making it unlawful "to sell or offer for sale drug paraphernalia." 21 U.S.C. 863(a)(1) and (2) (Supp. II 1990). See *United States* v. *Mishra*, 979 F.2d at 304 & nn.3-5.

Some courts have found a *mens rea* requirement for Section 857 in the definitional provision, Section 857(d), but we believe that provision establishes objective standards for determining what constitutes drug paraphernalia, not a subjective *mens rea* standard. Section 857(d) defines "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use" with controlled substances.[6] 21 U.S.C. 857(d) (1988). The critical language of the definitional provision is the two-part test that makes an item drug paraphernalia if it was either "primarily designed" for use with controlled substances or "primarily intended" for such use. In *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500 (1982), this Court construed an ordinance that required retailers to obtain a license to sell any items "designed or marketed for use with illegal cannabis or drugs." The Court concluded that the ordinance established two standards: a "'designed * * * for use' standard" and an "alternative 'marketed for use' standard." 455 U.S. at 500, 502. Similarly, the language of Section 857 defines two categories of drug paraphernalia: (1) items that are "primarily intended * * * for use" with illegal drugs and (2)

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[6] Section 857(d) lists 15 examples of items that are primarily intended or designed for use with illegal drugs. 21 U.S.C. 857(d)(1)-(15), App., *infra*, 2a-3a. Section 857(e) lists eight factors that may be considered "[i]n determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors." App., *infra*, 3a. Section 857(f) exempts from coverage any person authorized by law to manufacture, possess, or distribute an item, and "any item * * * traditionally intended for use with tobacco products." App., *infra*, 3a-4a.

items that are "primarily * * * designed for use" with illegal drugs.

In discussing the "designed for use" standard in *Hoffman Estates*, the Court noted that "[a] principal meaning of 'design' is '[t]o fashion according to a plan.'" 455 U.S. at 501, quoting *Webster's New International Dictonary of the English Language* 707 (2d ed. 1957). See also *Webster's Third New International Dictionary* 612 (1986) ("designed" means "done, performed, or made with purpose and intent"); *Random House Dictionary of the English Language* 539 (2d ed. 1987) ("designed" means "made or done intentionally; intended; planned"). In *Hoffman Estates*, the Court concluded that

> [i]t is therefore plain that the ["designed for use"] standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

455 U.S. at 501. The Court's conclusion in *Hoffman Estates* applies with equal force to the "primarily designed for use" standard of Section 857. An item is drug paraphernalia under the "designed for use" standard if it is principally used with illegal drugs by virtue of objective features designed by the manufacturer. Accordingly, if the item meets the "designed for use" standard, it is drug paraphernalia without regard to the knowledge or intent of a defendant who sells or transports the item. See *United States* v. *Mishra*, 979 F.2d 301, 308 (3d Cir. 1992);

United States v. *Schneiderman*, 968 F.2d 1564, 1567 (2d Cir. 1992), cert. denied, 113 S. Ct. 1283 (1993).[7]

Section 857 also provides that items "primarily intended * * * for use" with illegal drugs are drug paraphernalia. The statute does not state expressly whether the "primarily intended for use" standard refers to the intent of the defendant or to the intent of non-defendants, including distributors, retailers, and buyers. In our view, the phrase "primarily intended for use" refers not to the state of mind of the defendant, but to the use to which the item is likely to be put. That objective construction of "primarily intended for use" makes that phrase parallel the meaning of the accompanying phrase "primarily designed for use." In addition, the objective construction of "intended for use" is supported by the list of relevant factors in Section 857(e). The factors focus on the actual use of the item in the community, as revealed by instructions, advertising, and expert testimony. Although each of the factors listed in Section 857(e) would have some probative value in determining a defendant's subjective intent, it is significant that Congress omitted a factor that would have borne much more directly on the question of

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[7] An example of an item that meets the "designed for use" standard is a bong. As the principal author of the Model Drug Paraphernalia Act has explained, a bong "is drug paraphernalia without regard to who is holding it, or what my intent is; this is drug paraphernalia strictly because of its *design*." *Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 66 (1986).

subjective intent—the defendant's own statements about his intent. That omission is particularly striking when Section 857 is compared to the Model Drug Paraphernalia Act. The Model Act includes among the relevant factors "[s]tatements by an owner * * * concerning [the] use" of the object and "[d]irect or circumstantial evidence of the intent of an owner * * * to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act."[8] App., *infra*, 6a-7a. Congress's omission of both factors in Section 857 indicates that it did not intend to define drug paraphernalia in terms of the subjective intent of the defendant.

Our construction of the "intended for use" standard is also supported by Congress's use of similar language in Section 857(f), which provides an exemption for items "traditionally intended for use with tobacco products." App., *infra*, 4a. The "traditional" use of an item plainly does not depend on the subjective intent of a particular defendant. As originally enacted, moreover, the Section 857(f) exemption applied to items "primarily intended for use with" tobacco products. See Pub. L. No. 99-570, Tit. I, § 1822, 100 Stat. 3207. In 1988, Congress replaced "primarily" with "traditionally" in order to "clarif[y]" the meaning of the exemption. See Pub. L. No. 100-690, Tit. IV, § 6485, 102 Stat. 4384. If Congress had meant to shift from a subjective to an objective concept of intent, it is unlikely that it would have characterized the amendment as merely "clarifying" the law. Presumably Congress enacted the clarifying amendment because an item that is primarly intended for use with illegal drugs cannot be primarily intended for use with tobacco. The amendment makes clear that the exemption applies to items associated with tobacco as a matter of historical tradition, even if their primary present-day use is with illegal drugs.

Finally, our objective construction of the "primarily intended for use" language avoids the creation of an unusual *mens rea* standard and is consistent with the meaning of similar language in other federal criminal statutes. See 18 U.S.C. 921(a)(17)(B) ("armor piercing ammunition" excludes any projectile that the Secretary of the Treasury finds is "primarily intended" to be used for sporting purposes); 21 U.S.C. 860(d)(2) ("youth center" means a recreational facility "intended primarily for use by persons under 18 years of age").[9]

On either the objective or the subjective view, the "primarily intended for use" standard includes

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[8] Although the Model Act includes the owner's statements and other evidence of the owner's intent among the relevant factors, it expressly provides that "the innocence of an owner * * * as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia." App., *infra*, 7a.

[9] Consistent with this view, the district court instructed the jury that the term "primarily intended" was not limited to the intent of the defendant or "any particular person or persons." J.A. 31. We acknowledge, however, that several courts of appeals have construed the term "primarily intended for use" to refer to the defendants intent, *see, e.g., Michra*, 979 F.2d at 307 n.10; *Schneiderman*, 968 F.2d at 1567; *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir. 1989), and a statement by the principal sponsor of the Act in the House, see pp. 24-25, *infra*, lends some support to that construction.

"dual-purpose items" such as scales and razor blades that may be used for legitimate purposes as well as with illegal drugs. If those items are intended to be used primarily with controlled substances, they are drug paraphernalia without regard to the manufacturer's design.

B. It Is Appropriate To Infer A *Mens Rea* Requirement In Section 857

Although Section 857 does not contain an express *mens rea* requirement and defines "drug paraphernalia" without regard to the subjective intent of the defendant, it does not follow that Section 857 defines a strict liability offense. The Court has recognized that "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.'" *United States* v. *Bailey*, 444 U.S. 394, 402 (1980), quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). In *Morissette*, the Court, speaking through Justice Jackson, stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. Accordingly, criminal offenses that require no *mens rea* "have a 'generally disfavored status.'" *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978). "[T]he failure of Congress explicitly and unambiguously to

indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota*, 471 U.S. at 426. Instead, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States Gypsum Co.*, 438 U.S. at 438.

Despite this presumption, "courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980). In this instance, however, we do not believe that the language or legislative history of Section 857 demonstrates that Congress intended to dispense with a *mens rea* requirement.

As we have noted, Section 857(a)(1) makes it unlawful to use an interstate conveyance as part of "a scheme to sell drug paraphernalia." The use of the word "scheme" strongly suggests that Congress intended to require proof of *mens rea*. Although the word "scheme" was omitted from the statute when it was amended in 1990, that omission was designed to broaden the statute to reach additional conduct, but not to affect the statute's *mens rea* requirement. See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. I, at 108 (1990) (amendment eliminates requirement of a "scheme" and expands the scope of the Act to intrastate as well as interstate conduct).

Section 857 was first enacted as part of the Anti-Drug Abuse Act of 1986. See Pub. L. No. 99-570, Tit. I, § 1822, 100 Stat. 3207-51. No committee reports accompanied the legislation that became Section 857. The chief sponsor of the legislation in the House stated that the purpose of Section 857 was to

eliminate interstate commerce in drug paraphernalia. See *Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary (Hearing)*, 99th Cong., 2d Sess. 15 (1986) (remarks of Rep. Levine). Congress regarded that commerce as a public menace. As Representative Levine explained, the commerce in drug paraphernalia "glamorizes the drug culture," "encourages drug experimentation," and "serves to counter parental guidance as well as educational and community programs to prevent drug abuse." *Id.* at 18. See also 132 Cong. Rec. 31,420 (1986) (remarks of Sen. Wilson); *id.* at 26,451 (remarks of Sen. Wilson); *id.* at 22,920-22,921 (remarks of Rep. Levine); *Hearing* at 74-76 (remarks of Rep. Gilman); *id.* at 194-199 (remarks of Rep. Rangel).

The predecessor of Section 857 was the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration. See *Hearing* at 15 (statement of Rep. Levine) (Section 857 was "drafted closely after the Model Drug Paraphernalia Act" and "deliberately incorporates much of the same language that is contained in that act").[10] The Model Act, which has been adopted in some form by most States, defines "drug paraphernalia" as items "used, intended for use, or designed for use" with controlled substances. Art. I, App., *infra*, 4a. The commentary to the Model Act states that this language requires "a specific intent to violate, or to facilitate a violation of, the drug laws." Hearing at 187. Unlike Section 857, the Model Act expressly provides that it is "unlawful for any person to deliver, possess

[10] The Model Act is reprinted in the appendix to this brief.

with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, *knowing, or under circumstances where one reasonably should know*, that it will be used" in connection with controlled substances. Art. II, App., *infra*, 8a (emphasis added).

In enacting Section 857, Congress omitted the express *mens rea* provision in Article II of the Model Act and modified the definition of drug paraphernalia to apply to items "*primarily* intended or designed for use" with illegal drugs. Although those changes may suggest that Congress intended to eliminate a knowledge requirement and move in the direction of a strict liability offense, it is also possible that Congress omitted the *mens rea* language of the Model Act in order to delete from the federal statute the relaxed negligence standard ("under circumstances where one reasonably should know") that the Model Act contained.[11] See *infra* note 13 (discussing distinction between negligence and recklessness under the Model Penal Code). In any event, the change in language is not a sufficiently clear indicator of Congress's intent to overcome the strong presumption that Congress intends to include a *mens rea* requirement in criminal statutes.

During the House hearings on the legislation that became Section 857, Representative Levine, the prin-

[11] That hypothesis is supported by Congress's omission from Section 857 of other language from the Model Act referring to the "should reasonably know" standard of liability. See Model Act Art. I, App., *infra*, 7a (referring to evidence of a person's intent to deliver an item of alleged drug paraphernalia "to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act").

cipal sponsor of the legislation, engaged in the following colloquy with Representative McCollum:

> MR. MCCOLLUM: [I]t seems very clear the word "designed," would be very narrow. I don't have a real problem with that. If the cigarette papers were designed for the purpose of use in the drug manufacturing or the inhaling or the use [of] controlled substances or whatever, that is fairly clear. But what isn't clear is the fact that you have got another word in there "primarily intended for the use."
>
> Do you mean to say that intended, even though it was designed for multiple uses, that at the time, the seller, the particular seller of this drug paraphernalia sold it, that it was his intent in selling it that it be used for the purposes described? Is that the intent that the prosecutor would have to prove, the intent of the seller, or just what have you got in mind?
>
> MR. LEVINE: The purpose of the language in this section both in the model act, and in my legislation is to identify as clearly as possible the intent of the manufacturer and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court.
>
> MR. MCCOLLUM: An intent on the part of whom; on the part of the seller?
>
> MR. LEVINE: Well, it would depend on who is being prosecuted, if it was the seller, it would be the intent on the part of the seller. It would be the defendant. It would be the intent on the part of the defendant in a particular trial.
>
> My principal concerns in this area have always been with regard to sellers and manufacturers, but it would be the application with regard to whomever the defendant would be under the provisions of this act.

Hearing at 47-48; see also *id.* at 64 (statement of Rep. McCollum) ("the intent language in this statute, apparently by the will of the authors, would apply to the seller primarily, or whoever the person is that is being accused"). To be sure, the colloquy between Representative Levine and Representative McCollum was directed solely to the "primarily intended for use" standard; it did not address the alternative "primarily designed for use" standard. Although the colloquy therefore does not speak comprehensively to the *mens rea* question, it provides some indication that the legislation was not intended to create a strict liability offense.

C. In Order To Convict A Defendant Under Section 857, The Government Must Prove That The Defendant Knew The Items At Issue Are Used Primarily With Illegal Drugs

The Court has recognized that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States* v. *Bailey*, 444 U.S. at 403. "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.'" *Ibid.* But that distinction was "the source of a good deal of confusion." In recent years, the Court has looked to the analytical framework of the American Law Institute's Model Penal Code in construing the *mens rea* requirement of federal criminal statutes. 444 U.S. at 403-404. In determining what mental state is required in the absence of express direction from Congress, the Court has held that it is ordinarily enough if a defendant acts "knowingly," *i.e.*, that he is aware of the nature of his conduct or is aware that his conduct is practically certain to

cause a particular result. Model Penal Code § 2.02 (2)(b). The Court has not ordinarily inferred a requirement that the defendant act "purposely," *i.e.*, with the conscious object to engage in particular conduct or bring about a particular result. *Id.* § 2.02 (2)(a)(i).[12]

In *Bailey*, the Court recognized that, "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." 444 U.S. at 408. In that case, absent any indication from Congress as to the *mens rea* required for conviction under the federal escape statute, 18 U.S.C. 751(a), the Court read into the statute a requirement that "an escapee knew his actions would result in his leaving physical confinement without permission." 444 U.S. at 408. The Court rejected a heightened *mens rea* requirement—that the escapee acted "with the intent to avoid confinement."

In *United States Gypsum Co.*, the Court was confronted with a similar question—whether, in the absence of an explicit *mens rea* requirement, a criminal violation of the Sherman Act "requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow." 438 U.S. at 444. The Court concluded that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a suffi-

[12] The Model Penal Code concept of " 'purpose' corresponds loosely with the common-law concept of specific intent, while "knowledge' corresponds loosely with the concept of general intent." *Bailey*, 444 U.S. at 405.

cient predicate for a finding of criminal liability under the antitrust laws." *Ibid.* The Court reasoned that "[a] requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition * * * would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." *Id.* at 446.[13]

The general rule requiring that the defendant act "knowingly" is appropriate for Section 857. To obtain a conviction under Section 857(a)(1), it should be sufficient for the government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he

[13] The Model Penal Code also defines two additional culpability requirements: recklessness and negligence. A defendant acts "recklessly" with respect to an element of an offense if he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." Mode Penal Code § 2.02(c). A defendant acts "negligently" if "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(d). The Model Penal Code provides that when the standard of culpability is not established by statute, proof that the defendant acted recklessly is sufficient. *Id.* § 2.02(3). The commentary explains that "[t]his accepts as the basic norm what usually is regarded as the common law position." Section 2.02, comment 5, at 244. In *Bailey*, the Court did not decide whether recklessness was sufficient to warrant conviction under 18 U.S.C. 751(a), because the district court's instructions clearly required the jury to find that the defendants acted knowingly. 444 U.S. at 407, 409 n.7. As discussed below, see pp. 29-30, *infra*, we believe the jury instructions in this case required the jury to find that petitioners acted knowingly in order to convict them. Consequently, the Court need not consider whether recklessness is sufficient to warrant a conviction under Section 857.

knew were likely to be used with illegal drugs. See *Mishra*, 979 F.2d at 307, 308. As in *Bailey* and *United States Gypsum Co.*, the Court should decline to adopt a heightened standard of culpability. The purpose of a dealer in drug paraphernalia is to sell his wares. The seller may know that the items are very likely to be used with illegal drugs, but it is a matter of little consequence to the seller whether his buyers use a bong to smoke marijuana or as a flower vase. It would therefore be very difficult for the government to prove that the defendant's purpose was that the items be used with illegal drugs. If the Court were to impose a heightened culpability requirement, drug paraphernalia merchants could sell items used with illegal drugs as long as they took steps to establish that it was not their conscious object that the items be used with illegal drugs.

Finally, although the government is required to prove that the defendant knew the items at issue are used primarily in connection with illegal drugs, it is not required to prove that the defendant knew the items were drug paraphernalia within the meaning of the statute. The difference is illustrated by the Court's decision in *Hamling* v. *United States*, 418 U.S. 87 (1974). In *Hamling*, the Court held that 18 U.S.C. 1461, which prohibits the mailing of obscene materials, does not require the government to prove that the defendant knew the materials were obscene. The Court explained that "the word 'obscene,' as used in 18 U.S.C. 1461, is not merely a generic or descriptive term, but a legal term of art." 418 U.S. at 118. In holding that the government was not required to "prove a defendant's knowledge of the legal status of the materials he distributes," the Court relied on its prior decision in

Rosen v. *United States*, 161 U.S. 29 (1896). In *Rosen*, the Court reasoned that "[t]he evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene * * * was recognized as the test for determining whether the statute has been violated." 161 U.S. at 41-42. Accordingly, the Court held in *Hamling* that it was sufficient for the government to show that the defendant was aware of the "contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123. The same reasoning, and the same conclusion, applies here.

D. The District Court's Instructions Required The Government To Prove That Petitioners Knew The Nature, Character, And Use Of The Items They Sold

Consistently with the construction of Section 857 that we propose, the district court instructed the jury that, in order to convict petitioners of violating the statute, it was required to find that petitioners knew the "nature, character, and use" of the items at issue.

In defining the elements of the crime, the district court required the jury to find that "the items in question constitute drug paraphernalia," that drug paraphernalia consisted of items primarily intended or designed for use with illegal drugs, and that the defendant "knew the nature and character of the items." J.A. 21-22, 29. The court elaborated on the knowledge requirement, describing it as " 'knowledge' of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." J.A. 18. In connection with petitioners' defense of good faith, the court further instructed that the jury could consider evidence of the procedures

followed in petitioners' store to determine if those procedures were "inconsistent with the elements in the charges of the Indictment concerning the alleged knowledge of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." J.A. 20. Through its instructions, the district court thus informed the jury that it could not convict petitioners unless it found that petitioners knew that the items at issue were used primarily with illegal drugs.

E. Section 857 Is Not Unconstitutionally Vague As Applied To Petitioners

Petitioners contend (Pet. Br. 15-18) that Section 857 is unconstitutionally vague as applied in this case. In particular, petitioners contend that they were not provided with constitutionally adequate notice that items such as mannitol and inositol are drug paraphernalia within the meaning of the Act.[14]

As an initial matter, petitioners did not raise that argument in the court of appeals. Before the court of appeals, petitioners' "only point" was that the statute was unconstitutionally vague as applied "because law enforcement officers who executed the search warrants were able to 'totally ignore' the factors listed in subsection (e) for determining what constitutes drug paraphernalia." Pet. App. A31-A32. The court of appeals rejected that argument on the ground that the government did not ignore the factors in subsection (e). The court of appeals concluded (Pet. App. A32-A33) that "[t]he law enforcement officers, and more importantly, the government at trial, repeatedly referred to or used the factors listed (e.g., [petitioners'] advertising material, expert testimony) to establish that items being sold were illegal."

[14] In *Hoffman Estates*, the Court rejected arguments that a similar drug paraphernalia law infringed First Amendment rights, 455 U.S. at 495-497, and was unconstitutionally vague on its face, *id.* at 497-504. Petitioners do not advance either of those arguments here.

Whatever its standing in the abstract, Section 857 is not unconstitutionally vague as applied to petitioners. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). "[T]he more important aspect of the vagueness doctrine 'is * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358, quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974). See also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

Section 857 meets that constitutional standard. First, the statutory list of examples of drug paraphernalia provides potential defendants and law enforcement officers with "guideposts to prohibited conduct." *United States* v. *Dyer*, 750 F. Supp. 1278, 1296 (E.D. Va. 1990). See also *Mishra*, 979 F.2d at 309; *Schneiderman*, 968 F.2d at 1568. Such a list "lends greater definiteness to the statute and enhances, rather than diminishes, the notice of proscribed conduct." *Murphy* v. *Matheson*, 742 F.2d 564, 572 (10th Cir. 1984). See *Hoffman Estates*, 455 U.S. at 500-501 and n.18 (finding "speculation about the meaning of 'design' * * * largely un-

founded" because guidelines refer to specific items "as conclusively 'designed' or not 'designed' for illegal use"). Many of the items at issue in this case—including bongs, roach clips, and pipes designed for use with illegal drugs—are listed in Section 857(d). There is no plausible basis for arguing that the statute is unconstitutionally vague concerning those items.

Second, the factors set out in Section 857(e) "tend to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law." *Schneiderman*, 968 F.2d at 1568; see also *Mishra*, 979 F.2d at 309; *Dyer*, 750 F. Supp. at 1296-1297. The statutory factors ensure that "any decisions about prohibited dealing in drug paraphernalia are 'susceptible to appropriate reevaluation: the prosecutor can assess the arresting officer's case, the trial court can put the prosecutor to his proof, and the reviewing court can examine the trial court's findings.'" *United States* v. *Main Street Distributing, Inc.*, 700 F. Supp. 665, 669 (E.D.N.Y. 1988), quoting *Levas & Levas* v. *Village of Antioch*, 684 F.2d 446, 454 (7th Cir. 1982).

Third, the exemption in Section 857(f) for tobacco-related products further restricts the scope of the statute and "help[s] safeguard legitimate users of legal products from discriminatory enforcement." *Schneiderman*, 968 F.2d at 1568. See also *Dyer*, 750 F. Supp. at 1297. Finally, an implied *mens rea* requirement helps to cure any vagueness problem. See *Hoffman Estates*, 455 U.S. at 499 ("scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice * * * that [the] conduct is proscribed").

To be sure, Section 857 applies to "dual-use items"—items that have legitimate as well as illegitimate uses. "[A] certain degree of ambiguity necessarily surrounds the[] classification" of such items. *Mishra*, 979 F.2d at 309. But that does not mean the law is unconstitutionally vague.

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

Hamling v. *United States*, 418 U.S. 87, 124 (1974), quoting *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930).

In any event, this is not a borderline case involving an otherwise legitimate merchant engaged in isolated sales of dual-purpose items. Petitioners operated a "head shop"—a business devoted substantially to the sale of drug paraphernalia. Petitioners dealt in items that were included among the examples of drug paraphernalia in Section 857(d), such as bongs, roach clips, and pipes designed exclusively for use with drugs. Petitioners also sold other items, such as cocaine diluents advertised as such, that clearly met the statutory standards of Section 857(e) for items that are drug paraphernalia. In short, petitioners' conduct was at the core of the prohibited conduct defined by Section 857.

II. PETITIONER ACTY WAS PROPERLY CONVICTED OF AIDING AND ABETTING THE MANUFACTURE AND DISTRIBUTION OF COCAINE

A. The Jury Instructions Required The Government To Prove That Petitioner Acted For The Purpose Of Aiding The Manufacture Or Distribution Of Cocaine

Petitioner Acty contends (Pet. Br. 16-17) that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 4). She asserts (Br. 16-17) that "[t]he government's witnesses testified that mannitol, mannite and inositol were 'objectively' drug paraphernalia," and that under the district court's instructions the jury was "required * * * to find that the substances were intended for manufacturing with a controlled substance." Petitioner argues that the district court's instructions "create[d] 'a presumption that relieve[d] the [government] of its burden of persuasion on an element of the offense,'" in violation of the Due Process Clause of the Fifth Amendment. Pet. Br. 17, quoting *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985). Petitioner did not raise that argument in the court of appeals, and that court did not address it. In any event, petitioner's contention clearly lacks merit.

The district court's instructions to the jury on Count 4 required the government to prove that petitioner (1) knew that Randy Kennedy was engaged in the manufacture or distribution of illegal drugs, and (2) acted for the purpose of aiding Kennedy in the commission of that crime. The district court instructed the jury that in order to have aided and abetted Randy Kennedy's drug trafficking activities,

petitioner must, before or at the time the crime was committed:

> 1. Have known that the crime of the manufacture or distribution of cocaine was being committed or going to be committed by Randy Kennedy; and
> 2. Have knowingly acted in some way for the purpose of aiding the commission of the manufacture or distribution of cocaine by Randy Kennedy; and
> 3. Have done so knowingly.

J.A. 27. Accordingly, there is no basis for petitioner's assertion that the district court shifted the burden of proving *mens rea* to petitioner.

In addition, the district court did not instruct the jury that drug diluents are "*per se*" drug paraphernalia for purposes of Section 857—let alone for purposes of Section 841(a). In instructing the jury on Counts 1 and 2 (the Section 857 counts), the court read to the jury the list of items in Section 857(d). J.A. 29-30. Mannitol, mannite, and inositol are not among the items listed in Section 857(d). The court then instructed the jury that "if an item does not appear on this list," the jury should consider the eight factors set out in Section 857(e) to determine whether the item "constitute[s] drug paraphernalia for purposes of Section 857." J.A. 30. Finally, the court instructed the jury that "it is for you to determine the primarily intended use of any item by considering * * * all logically relevant factors." J.A. 31. In short, the district court did not instruct the jury that the drug diluents that petitioner sold to Randy Kennedy are "per se drug paraphernalia."

B. The Evidence Was Sufficient To Support Petitioner's Conviction For Aiding And Abetting The Manufacture And Distribution Of Cocaine

The petition presents the question "[w]hether the proof was adequate below for a jury to find guilt under 21 U.S.C. 841(a)(1)." Pet. iv. Petitioners' brief on the merits does not argue that the evidence was insufficient to support Acty's conviction on Count 4. That claim has therefore been waived. See Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* § 13.8 (6th ed. 1986) ("A question set forth in a petition * * * will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted."). In any event the evidence at trial was sufficient to support petitioner's conviction.

In order to aid and abet another to commit a crime, "it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Petitioner does not dispute that the 'knowing supply of a raw material necessary for the commission of a crime by another" may constitute aiding and abetting. *United States* v. *Perry*, 643 F.2d 38, 44 (2d Cir.), cert. denied, 454 U.S. 835 (1981). See also *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709 (1943) (prolonged cooperation between supplier and user gives supplier a "stake in the venture" operated by the user); *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342, 347 (1870); *United States* v. *Eberhardt*, 417 F.2d 1009, 1013 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 746-748 (3d ed. 1982).

The evidence presented at trial showed that, from March 1989 until January 1990, Randy Kennedy distributed cocaine in central Iowa. Tr. 1547-1549. Kennedy obtained his cocaine in Phoenix, Arizona. Tr. 1548. He "cut" or diluted the cocaine using mannitol, procaine, or other chemicals that he obtained from Forbidden Fruit, and he also obtained scales for weighing the cocaine and plastic baggies for packaging it from Forbidden Fruit. Tr. 1550-1553, 1557. Kennedy testified that he made so many trips to Forbidden Fruit that he could not count them. Tr. 1552. In all, he spent between $2,000 and $4,000 at the store during this period. He made all his purchases in cash. *Ibid.* Kennedy testified that he knew Acty and that she had personally sold him some of the items that he purchased. Tr. 1554-1555. Kennedy asked to purchase "cut" on occasion. Tr. 1566. Acty indicated to Kennedy that he should not use that word. Tr. 1573. Kennedy testified that there was "no question" in his mind that "everybody in that store knew what I was there for, and really had the idea that I was using this stuff to cut and package and distribute cocaine." Tr. 1573.

The government also presented evidence that Acty sold drug diluents to at least three other drug dealers in amounts that would be used by drug dealers. Pet. App. A40; Tr. 40-43, 721, 1502. One of the dealers frequented the shop four or five times a week and spent $5,000 there in a five-month period. Tr. 721. In addition, Acty's advertisement for one of the drug diluents specifically stated that it was to be used to "cut" cocaine. Pet. App. A40; GX 164.

This evidence, together with the overwhelming evidence that Acty was operating a "head shop," established Acty's knowledge of the drug-related character of the items she sold to Kennedy. From the nature, frequency, and size of Kennedy's purchases, the jury was justified in concluding that Acty knew that Kennedy was engaged in drug trafficking. Likewise, the jury could reasonably infer that Acty sold Kennedy the tools of his trade for the purpose of aiding in the manufacture and distribution of cocaine. Acty had a continuing personal stake in the success of Kennedy's illicit operations—reaping the profits that she knew would come from his repeated purchases of drug paraphernalia. See *Direct Sales Co.*, 319 U.S. at 713. Accordingly, Acty was properly convicted of aiding and abetting Kennedy's drug trafficking activities.[15]

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[15] Acty also contends (Br. 17-18) that her conviction for money laundering in violation of 18 U.S.C. 1956(a)(1) should be reversed. She did not raise that issue in her petition for a writ of certiorari. Accordingly, she is not permitted to raise it in her brief on the merits. See Sup. Ct. R. 24.1(a). In any event, her argument is unconvincing. Contrary to Acty's assertion, the district court specifically instructed the jury that an "essential element" of the offense of money laundering is "[t]hat the defendant whose case you are considering knew the monetary instruments involved represented the proceeds of an unlawful activity" and "intended the financial transactions to promote the sale of drug paraphernalia and to aid and abet in the manufacture and distribution of a controlled substance." J.A. 28.

Finally, Acty asserts (Br. 4, 15) that her convictions for investing income derived from a drug offense, in violation of 21 U.S.C. 854 (Count 5), and engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957 (Counts 7 and 8), must also be reversed. She did not raise that argument in the petition for certiorari or in the court of appeals, and it is therefore not properly presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 857 of Title 21, U.S. Code (1988), provides:

§ 857. Interstate and foreign sale and transportation of drug paraphernalia

(a) Unlawful acts

It is unlawful for any person—

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than $100,000.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513) [21 U.S.C. 801 et seq.]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as—

(1) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(2) water pipes;
(3) carburetion tubes and devices;
(4) smoking and carburetion masks;
(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;
(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
(7) chamber pipes;
(8) carburetor pipes;
(9) electric pipes;
(10) air-driven pipes;
(11) chillums;
(12) bongs;
(13) ice pipes or chillers;

(14) wired cigarette papers; or
(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;
(2) descriptive materials accompanying the item which explain or depict its use;
(3) national and local advertising concerning its use;
(4) the manner in which the item is displayed for sale;
(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
(7) the existence and scope of legitimate uses of the item in the community; and
(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or
(2) any item that, in the normal lawful course of business, is imported, exported, trans-

ported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

2. The Model Drug Paraphernalia Act provides:

ARTICLE I

(DEFINITIONS)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, con-

verting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a contorlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for

use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or to short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use."

ARTICLE II

(OFFENSES AND PENALTIES)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (POSSESSION OF DRUG PARAPHERNALIA)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (B) (MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, com-

pound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (C) (DELIVERY OF DRUG PARAPHERNALIA TO A MINOR)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (D) (ADVERTISEMENT OF DRUG PARAPHERNALIA)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

ARTICLE III

(CIVIL FORFEITURE)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all paraphernalia as defined by Section ( ) of this Act."

ARTICLE IV

(SEVERABILITY)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

3. Section 841(a) of Title 21, U.S. Code provides:

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent ot distribute or dispense, a counterfeit substance.

4. Section 2 of Title 18, U.S. Code, provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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